United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

May 24, 2012

The Honorable Eric Holder
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Honorable Julius Genachowski
Chairman, Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Attorney General Holder and Chairman Genachowski:

I am writing to you concerning the spectrum sale, marketing agreements and joint technology venture between Verizon Wireless and SpectrumCo LLC, and Verizon Wireless and Cox Communications which are now under review at both the Justice Department and the Federal Communications Commission. Our Subcommittee on Antitrust, Competition Policy and Consumer Rights held a hearing on these transactions on March 21, 2012 and I write to summarize my concerns about them. In brief, without reaching any final judgment as to the legality of these transactions under the antitrust laws or Communications Act, I believe these transactions present serious competition concerns which should be examined closely by your agencies for the reasons set forth below.

The Sale of Wireless Spectrum

Verizon Wireless, the largest wireless company in the United States with a 33% market share,[1] seeks to acquire a significant amount of AWS spectrum from SpectrumCo (a consortium of three cable companies, Comcast, Time Warner Cable and Bright House) and Cox Communications (hereinafter the "Cable Companies"). These transactions would result in Verizon Wireless acquiring 20 or 30 megahertz of spectrum in markets covering approximately 94% of the U.S. population.

In deciding whether to approve the spectrum sale, the FCC should be guided by the principle that wireless spectrum is not simply a privately held commercial asset, but consists of the <u>public airwaves</u> to be deployed in the <u>public interest</u>. For this reason, the parties to the transaction bear the burden of proving that it will serve the public interest.[2] In determining whether the transaction is in the public interest, the FCC must ensure the transaction "encompasses the broad aims of the Communications Act," including "a deeply rooted preference for preserving and enhancing competition."[3] For its part, the Justice Department must ensure that this spectrum sale does not "tend to substantially lessen competition" contrary to Section 7 of the Clayton Act.

[1] Verizon Wireless and AT&T collectively control nearly two thirds of the national wireless market. Verizon Wireless is 55% owned by Verizon, which is one of the nation's two largest landline phone companies.

[2] *Application of AT&T Inc. and Qualcomm Inc. for Consent to Assign Licenses and Authorizations*, WT Docket No. 11-18, FCC 11-118 at ¶ 26 (FCC 2011).

[3] <u>Id</u>. at ¶¶ 24, 27.

Verizon Wireless argues that acquisition of this spectrum is necessary to meet the burgeoning demand for spectrum by smartphones and mobile devices and that it does not exceed the FCC's spectrum screen in the vast majority of markets.[4] Nonetheless, competitive carriers argue that acquisition of this AWS spectrum by Verizon Wireless would be anticompetitive and not in the public interest. They point out that spectrum is a scarce resource, and that this AWS spectrum is essential for them to compete with Verizon Wireless (and AT&T), especially in delivering what is know as 4G LTE service used by data-driven smartphones.[5] The AWS spectrum is particularly critical for competition because of its wavelength and propagation characteristics. With one exception discussed below, there appears to be no other spectrum of this type available for competitive carriers in the foreseeable future, and no prospect of the FCC auctioning any such spectrum for at least three or four years, or longer.[6]

There is no question that wireless spectrum is an essential input to providing a competitive wireless service and that the exploding demand for spectrum by Internet connected smartphones and wireless devices makes wireless spectrum more essential than ever. However, spectrum acquisitions can be a strategic tool employed by dominant wireless carriers to entrench their market position and suppress competition. As the American Antitrust Institute points out, "The risk of spectrum concentration is that it further entrenches the dominant firms by augmenting their cost and scale advantages. Moreover, the acquisition of spectrum by a dominant firm not only gives the firm more spectrum, it also means the non-dominant firms have less... And by keeping spectrum out of the hands of smaller rivals and potential entrants, the aggregation of spectrum can lead directly to higher prices and lower output."[7] As our hearing witness and antitrust telecom expert Professor Wu stated in his testimony, "Every hertz that Verizon gains is a hertz denied a smaller competitor."[8]

As part of the marketing agreements, the Cable Companies have the right, after a four year period, to launch wireless service using spectrum and facilities on the Verizon Wireless network purchased on a wholesale basis as an MVNO (a "Mobile Virtual Network Operator"). As compared to a full-fledged facilities-based competitor, relying on MVNOs to provide competition does not seem to be sufficient because they will be wholly dependent on Verizon Wireless for pricing and access to its network. Relying on carriers captive to Verizon Wireless is plainly a shadow of the competition that could be offered from an actual facilities based competitor.

After our Subcommittee hearing, Verizon Wireless announced it was offering to sell its unused spectrum licenses in the 700 Mhz band, in A and B block, conditioned upon approval of Verizon Wireless's purchase of the cable companies' AWS spectrum. Although spectrum below 1 GHz is typically considered the most desirable, some competitive carriers and consumer groups have raised concerns about the quality of this 700 Mhz spectrum. For example, the A block has substantial interference problems in a number of major markets, including New York City, San Francisco, San Jose and Los Angeles. Additionally, while the AWS spectrum Verizon Wireless seeks to acquire is national in scope, the A and B blocks of 700 Mhz spectrum are not national and cover only selected markets. Finally, consumer groups assert that this sale would not mitigate the competitive concerns if the

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[4] In re Applications of Cellco Partnership d/b/a/ Verizon Wireless and SpectrumCo LLA and Cox TMI Wireless, LCC For Consent to Assign Wireless Licenses, WT Docket No. 12-4 (hereinafter "FCC Verizon/Cable Proceeding") (filed Dec. 16, 2011, Ex. 1 at p. 7)(hereinafter "Verizon Wireless/SpectrumCo FCC Filing"). Id. at 8-9.

[5] Petition to Deny of T-Mobile USA, Inc., FCC Verizon/Cable Proceeding (filed Feb. 21, 2012)(hereinafter "T-Mobile Petition to Deny") at p. i and 10. See also, March 20, 2012 Letter from Thomas J. Sugrue, Senior Vice President, Government Affairs, T-Mobile USA, Inc. to Sens. Herbert H. Kohl and Mike Lee at p. 2.

[6] Petition to Deny of Free Press, FCC Verizon/Cable Proceeding, filed Feb. 21, 2012 at 14.

[7] American Antitrust Institute, "Verizon's Deals With Cable Companies Raise Significant Competitive Issues," (April 2012) at p. 5.

[8] Written Testimony of Tim Wu, Senate Antitrust Subcommittee Hearing on "The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers" (hereinafter "Senate Antitrust Subcommittee Hearing") at p. 3.

spectrum was to be acquired by AT&T, as this would be likely to simply further the trend towards a duopoly market with AT&T and Verizon Wireless holding substantial portions of the most valuable spectrum. Thus it seems doubtful that Verizon's offer will significantly mitigate the competitive issues posed by its spectrum acquisition.

There is considerable precedent for the Justice Department to take action under antitrust law to prevent a dominant firm from gaining access to essential inputs needed by a rival to compete.[9] The Justice Department should carefully scrutinize this transaction to determine if this precedent mandates action. In so doing, the Justice Department should weigh the purported consumer benefits in Verizon Wireless gaining greater spectrum holdings to meet burgeoning spectrum demand, and the likely effects of Verizon Wireless's plans to sell spectrum in the 700 Mhz A and B blocks, against the competitive consequences of other wireless carriers being foreclosed from access to AWS spectrum and whether or not this is likely to substantially degrade competition in the wireless industry by denying rivals access to an essential input.

Further, I urge FCC to examine the competitive consequences of this transaction without being unduly limited by a mechanical application of its spectrum screen. The wireless market has changed significantly since the spectrum screen was first adopted more than a decade ago, especially with the development of smartphones and mobile devices. Furthermore, the spectrum screen may be inadequate as not accurately taking into account the value of differing types of spectrum. As the FCC recognized late last year in its review of the AT&T/ Qualcomm transaction, "[t]he Commission examines the effects of spectrum aggregation on the marketplace on a case-by-case basis."[10] The FCC should follow the same approach in evaluating this transaction.

Your agencies should also take note of the timing of this deal in December 2011, just days before the abandonment of the proposed AT&T/T-Mobile merger. T-Mobile alleges that the sale was timed to effectively deny T-Mobile an opportunity to bid on this spectrum.[11] The Cable Companies deny this and contend that they announced their plans to sell the spectrum well before the AT&T/T-Mobile merger was announced in March 2011. Comcast also has said that it would only sell the spectrum to a party that had a strong national presence and scope so that it could enter into the marketing agreements "that provide us with a comprehensive strategic wireless solution for our company."[12] Our Subcommittee does not have access to relevant documents or facts needed to assess the merits of these competing arguments; however we believe it is important that your agencies scrutinize them determine whether other competitors had a fair opportunity to bid on the spectrum.

I also urge the Justice Department and FCC, should your agencies decide to approve this spectrum sale, to require appropriate divestitures where needed to prevent Verizon Wireless from gaining excessive levels of spectrum concentration, thereby ensuring consumers have the benefits of a fully competitive wireless marketplace. In so doing, I urge the FCC not necessarily be limited to its spectrum screen, but to consider the value and utility of Verizon Wireless's spectrum holdings in

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[9] See ABA Section of Antitrust Law, Antitrust Law Developments (7th ed.2012) at 389 n. 393. See also, *Virginia Vermiculite Ltd.v. WR Grace & Co.,* 156 F.3d 535 (4th Cir. 1998) (sale designed to keep scarce vermiculate reserves from competitor could violate antitrust law). Indeed, in 1998 the Justice Department brought an antitrust lawsuit to prevent an acquisition of unused satellite television spectrum by a consortium of cable companies on the basis that the cable companies would use the spectrum in a less competitive manner than other potential purchasers. See *U.S. v. Primestar Inc. et al.,* Complaint No. 1-98CV01193 (D.D.C. May 12, 1998).

[10] *In the Matter of the Application of AT&T Inc. and Qualcomm Inc For Consent to Assign Licenses and Authorizations,* WT Docket No. 11-18, (FCC, Dec. 22, 2011) ¶ 31. The FCC also noted that "we anticipate that as we consider the input market for spectrum in future transactions, revisions to the screen may be necessary." ¶ 42.

[11] T-Mobile Petition to Deny at p. 15.

[12] David Cohen responses to Questions for Record from Sen. Herb Kohl, Senate Antitrust Subcommittee Verizon/Cable Hearing ("Cohen QFR Responses"), Response to Question 1.

evaluating whether divestitures are necessary. Further, in order to avoid the creation of a duopoly among large spectrum holders, I urge your agencies to consider excluding AT&T from eligibility to purchase any spectrum divested (or from acquiring the 700 Mhz spectrum to be sold by Verizon Wireless).

Your agencies made the correct decision to preserve competition by your courageous decision last year to take action to block the AT&T/T-Mobile merger. We must be especially vigilant this year to ensure that this transaction does not jeopardize a competitive wireless market for consumers that your agencies recently worked so hard to preserve.

The Marketing Agreements and Joint Technology Venture

Verizon Wireless and the Cable Companies, which represent 72% of all cable customers nationwide, have entered into joint marketing agreements where Verizon Wireless will sell the cable companies' video, Internet and landline phone services to Verizon Wireless customers. Further, the cable companies will sell Verizon Wireless service to the cable companies' customers. In some cases, sales representatives of each service will be in each other's stores and the parties will receive a one time "commission" payment for selling each other services in the low hundreds of dollars (the parties have not publicly stated the exact amount).

These marketing agreements raise serious competition issues. Verizon and the Cable Companies are currently fierce competitors. In the portions of 12 states and the District of Columbia where Verizon offers its fiber to the home FiOS service, Verizon and the Cable Companies compete for video, broadband Internet connections, and landline phone service.[13] Even in the areas in the Verizon footprint where it does not offer FiOS, Verizon and the Cable Companies compete for Internet connection and landline telephone service.

The premise behind the Telecommunications Act of 1996 was intermodal competition – that phone and cable companies would vigorously compete with each other for all of their services, whether telephony, Internet connections, or video.[14] The Act was intended to encourage the phone and cable companies to enter each other's markets so that, consumers would benefit from vigorous price competition and enhanced innovation. In the last decade we have seen this vision being realized in many respects, with cable companies offering telephony, phone companies offering video services, most notably Verizon's FiOS service, and both phone and cable companies competing to offer Internet access.

Critics of these agreements fear that these deals signify a truce between one of the largest phone companies, Verizon, and four of the largest cable companies representing over 70% of the cable market, and that they represent an implicit promise by Verizon to stand down from its competitive battle, particularly for video customers. There is a real concern these agreements transform Verizon and the Cable Companies from fierce competitors into business partners because they lessen the incentive for Verizon and the Cable Companies to compete aggressively against the other, particularly in the markets where Verizon has deployed FiOS.

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[13] These are major markets including the Baltimore area (excluding the city of Baltimore), Boston, Los Angeles, New York, Philadelphia, Pittsburgh, Providence, R.I., Richmond, VA., Tampa, and the Washington, D.C. metropolitan areas.
[14] The legislative history of the Telecommunications Act of 1996 makes clear the emphasis on intermodal competition between phone and cable companies. The conferees to the bill sought "to maximize competition between local exchange carriers and cable operators within local markets." Conference Report, Telecommunications Act of 1996, House of Representatives, 104th Cong., 2d Sess., H. Rept. 104-458). See also, Conference Report on S. 652, Telecommunications Act of 1996, 142 Cong. Rec. H1145, H1151 (Feb. 1, 1996).

At the outset, it is my view that the fact that these deals are with Verizon Wireless, not its parent Verizon, does not mean that your agencies should not consider the effects of these agreements on competition between Verizon and the cable companies. Verizon is the 55% owner of Verizon Wireless, appoints five members to Verizon Wireless's nine member Board of Directors (including Verizon Wireless's Chairman and CEO), and Verizon Wireless accounted for 63% of Verizon's aggregate revenues in 2011. Clearly the business dealings of Verizon Wireless are highly relevant to Verizon's own business plans and strategy.

The competitive effects of these transactions are of the highest concern in the areas served by both the Cable Companies and Verizon FiOS service (or where Verizon is obligated to build out FiOS) where they compete head-to-head with respect to video, Internet connection, and landline telephony services. Verizon FiOS is a very successful part of Verizon's overall business, with 4.2 FiOS TV and 4.8 million FiOS Internet subscribers. FiOS revenues, $ 8.2 billion in 2011, now represent 61% of overall Verizon's wireline consumer revenues, and grew 8.5% in 2011 alone.[15] FiOS growth is to a large extent a result of taking market share from the cable companies with which it competes – FiOS increased its market penetration by about 4% in 2011.[16] As of a year ago, FiOS TV had a market penetration of 32%, and FiOS Internet's market penetration was 36%.[17]

Consumers in the areas served by Verizon FiOS have realized the benefits of vigorous head-to-head competition between Verizon and the local cable operator. The FCC has found that where competition exists between rival cable TV services, consumers realize lower prices on average than those without such competition, and that the prices for the rival are even lower than the incumbent.[18] As we have all seen, FiOS and the cable companies have been engaged in an aggressive advertising battle to win business, with heavily promoted special offers and claims about who offers the best video service and highest quality Internet connection. In addition, the FCC has noted that cross-platform competition spurs investment in infrastructure by the rival companies, all to consumers' benefit.[19]

So it is crucial that your agencies examine the competitive implications of these marketing agreements and ensure that nothing in these agreements will cause or incentivize Verizon or the cable companies to lessen or stand down from this competitive battle. The Justice Department should ensure that nothing in these agreements runs afoul of the prohibition in Section 1 of the Sherman Act of a "contract, combination . . . or conspiracy" in "restraint of trade."

The parties to these deals argue that competition will actually be enhanced in the areas served by FiOS and being able to have a choice of competing services in one place. In words of Comcast's Executive Vice President David Cohen at our hearing, "those stores are like Switzerland and they're going to become additional battlegrounds for Comcast to compete against FiOS and for FiOS to

[15] Verizon 4th Quarter 2011 Earnings Results, Fran Shammo, Chief Financial Officer at p. 12 (Jan. 24, 2012).
[16] Joint Opposition to Petition to Deny and Comments, Cellco Partnership d/b/a Verizon Wireless, SpectrumCo LLC, Cox TMI Wireless, LLC, FCC Verizon/Cable Proceeding, March 2, 2012, Exhibit 6 at p. 8. See also, Reply Comments of Communications Workers of America at p. 7.
[17] Verizon 4th Quarter 2011 Earnings Results, Fran Shammo, Chief Financial Officer at p. 12 (Jan. 24, 2012).
[18] *In Re Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment,* Report on Cable Industry Prices, MM Docket No. 92-266, DA-12-377 at ¶ 5 (March 9, 2012)(with respect to expanded basic service, as of Jan. 1, 2010, "prices on average were 1.5% lower . . . for incumbent cable operators in communities with a rival operator, [and] 9.6% lower . . . for the rival operators . . .").
[19] In its national broadband plan, the FCC found that "[t]he presence of a facilities-based competitor impacts investment. Indeed, broadband providers appear to invest more heavily in network upgrades in areas where they face competition." *Connecting America: The National Broadband Plan,* Chapter 4 at p. 38, http://download.broadband.gov/plan/national-broadband-plan-chapter-4-broadband-competition-and-innovation-policy.pdf.

compete against Comcast."[20] However, we must be cognizant of the potential for information sharing and even the possibility of collusion by representatives of competing firms being present in one store and selling competing products, and jointly selling one "quad play." These considerations must be weighed carefully in determining the permissibility of these marketing arrangements in the Verizon territories under antitrust law. Further, it is clear that at least for the largest cable company in the deal, Comcast, the marketing agreements were a necessary condition for agreeing to sell the wireless spectrum to Verizon Wireless.[21] In that light, your agencies should carefully examine whether any promises with respect to competition were offered in exchange for these marketing agreements.

Under the Joint FTC/Justice Department Antitrust Guidelines for Collaborations Among Competitors (hereinafter the "Collaboration Guidelines"), marketing collaborations "may be procompetitive, for example, where a combination of complementary assets enables products more quickly and efficiently to reach the marketplace. However, marketing collaborations may involve agreements on price, output, or other competitively significant variables, or on the use competitively significant assets . . . that can result in anticompetitive harm." The Collaboration Guidelines further point out that marketing collaboration can result in "combining financial interests in ways that undermine incentives to compete independently. For example, joint promotion might reduce or eliminate comparative advertising, thus harming competition by restricting information to consumers on price and other competitively significant variables."[22] The vigorous nature of the comparative advertising between FiOS and the cable companies makes this consideration especially relevant to the Justice Department's analysis of these agreements.

Among the factors cited by the Collaboration Guidelines in determining whether an agreement is permissible is whether the agreement is exclusive (that is, whether the participants can continue to compete either "through separate, independent business operations or through membership in other collaborations") and the duration of the collaboration.[23] In this regard, it has been widely reported that the agreements are in fact exclusive (that is, Verizon Wireless cannot enter into similar marketing agreements with other cable companies and the Cable Companies cannot enter into similar deals with other wireless companies) and of unlimited duration. The parties would not confirm these facts to our Subcommittee (claiming them to be confidential),[24] but if they exist, such provisions should be weighed carefully by the Justice Department in determining the permissibility of these agreements.[25] Your agencies should also examine whether any exclusivity arrangements with over 70% of the cable market may give Verizon Wireless undue advantages over other wireless competitors.

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[20] Verizon General Counsel Randy Milch likewise denies that Verizon's incentives will be changed by these agreements, stating categorically that "Verizon Telecom has every incentive to continue to compete vigorously with the cable companies on pricing, marketing and promotion of FiOS, and plans to spend hundreds of millions of dollars this year to market FiOS." Verizon Communications Response to Sen. Kohl's Follow-Up Questions, March 2012 Senate Antitrust Subcommittee Hearing, (hereinafter "Milch QFR Responses") Response to Question 14.

[21] When asked "[i]f Verizon hadn't agreed to the joint-marketing agreements, would you still have been willing to sell the spectrum?", David Cohen of Comcast replied "[t]he transaction is an integrated transaction. There was never any discussion about selling the spectrum without having the commercial agreements." Eliza Krigman, "Comcast Executive Defends Verizon-SpectrumCo Deal," PoliticoPro, March 8, 2102.

[22] Federal Trade Commission and U.S. Department of Justice, Antitrust Guidelines for Collaboration Among Competitors, ¶ 3.31(a) at p. 14 (April 2000).

[23] Id. ¶ 3.34 at p. 19.

[24] Verizon does not deny that exclusivity terms exist, just that "any exclusivity arrangements in the agreements are necessary to ensure the parties commit sufficient resources to the commercial arrangements to bring new products to market and offer competitive bundles of telecommunications services." Milch QFR Responses, Response to Question 7.

[25] In this regard, it is notable that the Collaboration Guidelines state that "the Agencies use ten year terms indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger." Id. at p. 5 n. 10.

In light of all of these considerations and the potential risks to competition in the Verizon FiOS footprint, I urge your agencies to seriously consider taking action to prohibit these marketing agreements from taking effect in the area in which FiOS is currently deployed, or in which Verizon has received approval from local franchise authorities to build FiOS, should you conclude implementation of these agreements in these localities would violate Section 1 of the Sherman Act or the Communications Act.

The marketing agreements also raise competitive concerns with respect to areas inside the Verizon 12-state footprint not currently served by FiOS. First, in these areas, Verizon competes with the cable companies with respect to Internet connection and landline phone service. Once again, your agencies should scrutinize whether these agreements will result in any incentive for the parties to lessen their level of competition for these services in these areas.

Second, a substantial question arises as to whether these agreements lessen Verizon's incentive to deploy FiOS into new areas, thereby depriving those consumers of the benefits of competition. Verizon points out that it decided in 2009 not to build FiOS into any new areas given the considerable capital expenditure deployment requires. However, given the growing importance of the FiOS service to Verizon – accounting for over 60% of Verizon consumer wireline revenues and capturing market shares of a third and growing – it is a legitimate question to ask whether Verizon might decide to change course and build in new areas absent these marketing agreements.[26] Put another way, Verizon FiOS is a potential competitor in the Verizon footprint where it has not yet been deployed. These marketing agreements' impact on a potential competitor, Verizon FiOS, should be scrutinized by the Justice Department.[27]

The marketing agreements appear to have the least impact on competition in the 38 states outside Verizon's footprint. With the exception of Verizon Wireless's Internet service offering on wireless devices, the cable companies do not compete with Verizon in these areas of the country. However, even in these 38 states, these agreements may affect wireless competition if they are exclusive by denying other wireless competitors a cable partner for a similar marketing deal inover 70% of the cable market represented by the four cable companies that are parties to these agreements, or if wireless Internet access becomes a close enough substitute for landline Internet.

The third transaction between the parties establishes a joint venture between Verizon Wireless and the SpectrumCo cable companies[28] to develop new technologies that integrate wireline and wireless services. Concerns have been expressed that this joint venture "could develop and deploy proprietary, incompatible technologies for set-top boxes and other 'interactive communications equipment' that inhibit the development of nationwide standards. The joint operating entity could either refuse to license these technologies at all, or... license them only to companies that are able to comply with difficult... testing criteria."[29] Moreover, the meetings and collaborative work necessary to implement this joint venture could facilitate anti-competitive collaborations on other topics. We urge the Justice

[26] Verizon argues that it would be economically irrational for it to alter any plans to expand FiOS because it would only realize a commission in the low hundreds of dollars from this deal while losing the potential to earn thousands of dollars per year for each FiOS customer. However, industry experts have estimated that it costs Verizon thousands of dollars per customer to build the infrastructure to provide FiOS service. The commissions meanwhile will require none of that infrastructure or investment. Therefore your agencies should examine whether these commission payments could indeed alter Verizon's incentives with respect to expanding FiOS service to new areas.

[27] Cf. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines § 2.1.4 (2010)(In the merger context, when analyzing a merger's competitive significance, agencies may consider "whether merging firms have been, or likely will become absent the merger, substantial head-to-head competitors").

[28] Cox is not a party to this agreement.

[29] Petition to Deny of Public Knowledge, FCC Verizon/Cable Proceeding, at p. 28-29.

Department to scrutinize this arrangement carefully, and, if necessary, to implement safeguards on the operation of the joint venture to prevent any such anti-competitive behavior.

Consumer groups and competitors raised a host of other potential issues during the course of the Subcommittee's examination and at our hearing. For example, they are concerned that the marketing agreements may contain provisions about, or that could facilitate, anticompetitive conditions in the marketplace. Among their concerns are whether the agreements contain provisions regarding joint purchasing of programming that would disadvantage both competing cable and satellite companies and programmers seeking to sell programming,[30] or incentives for the cable companies to no longer offer competitive backhaul services to competitive wireless providers.[31] With respect to these provisions, the Subcommittee did not have an opportunity to review the marketing agreements because of their confidentiality and therefore cannot express any opinion as to the merits of these concerns. However, we urge your agencies to review these agreements carefully to ensure they are not likely to substantially injure competition in any adjacent markets.

In closing, our Subcommittee places the highest priority in maintaining competition in telecommunications markets. Cell phones and wireless devices are now ubiquitous in American life, and maintaining a competitive market in this industry is of the highest national importance to our economy and to millions of consumers. Likewise, consumers have a high stake in competition for video, Internet connections and telephone service, competition which has not always been robust. Policymakers have worked very hard to encourage competition in these markets, both by virtue of the Telecommunications Act of 1996 with its goal of seeing phone and cable companies compete in each other's markets, and, more recently, the Justice Department's and FCC's successful challenge to the proposed AT&T/T-Mobile merger to preserve a competitive national wireless market.

Because the stakes are so high, and this transaction involves some of the largest players in both the wireless and cable markets, I urge both of your agencies to carefully scrutinize this transaction and its potential impact on competition and consumers. It is particularly important that you ensure both that consumers will reap the benefits of vigorously competing wireless carriers that have access to the spectrum they need to compete, and that nothing in the marketing agreements creates any incentives for Verizon and the Cable Companies to lessen their current competitive battle.

Thank you for your attention to this matter.

Sincerely,

Herb Kohl

HERB KOHL
Chairman, Subcommittee on
Antitrust, Competition Policy
and Consumer Rights

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[30] Both Verizon and Comcast state that the marketing agreements have no such provisions. Milch QFR Responses, Response to Question 16; Cohen QFR Responses, Response to Question 9.

[31] Comcast asserts that it "will continue to provide backhaul competition. [I]t is a part of our growth strategy, . . . [and] [w]e have every incentive to invest in and grow this business and to provide services to as many wireless companies as possible." Cohen QFR Responses, Response to Question 4.